



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

December 13, 2019

BY ECF

Honorable Paul A. Engelmayer
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

Re: *United States v. Daniel Hernandez*, S5 18 Cr. 834 (PAE)

Dear Judge Engelmayer:

The Government writes in response to the Court's December 12, 2019 Order requesting (1) the Government's position with respect to the Probation Department's Guidelines calculation, and (2) the Government's response to the defense's objection to the defendant's criminal history calculation.

First, the Government agrees with the Probation Department's Guidelines calculation. In light of the United States Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), however, the Government will move to dismiss Count Two at sentencing. Thus, absent relief pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), the defendant's mandatory minimum term of incarceration would be 37 years' imprisonment.

Second, The Government concurs with the Probation Department's criminal history calculation. The defendant was assessed one criminal history point, pursuant to U.S.S.G. § 4A1.1(c), due to his October 26, 2018 sentence of four years' probation after having been convicted of Use of a Child Less Than 17 Years of Age in a Sexual Performance, in violation of New York Penal Law § 263.05, a Class C Felony. In addition, the defendant was assessed two criminal history points, pursuant to U.S.S.G. § 4A1.1(d), because he was still a member of the Nine Trey Gangsta Blood racketeering conspiracy, as charged in Count One, until November 16, 2018, when the defendant publicly denounced the gang. Thus, because the defendant was still a

member of the racketeering conspiracy while on probation, the two-point assessment is warranted. Accordingly, with three criminal history points, the defendant is in Criminal History Category II.

Respectfully submitted,

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